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No. 92-563

FILED
DEC. 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLIFFORD HELTON AND CHARLES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 21 U.S.C. 841(b)(1)(B)(vii) and its implementing Sentencing Guidelines provision violate the Due Process Clause because, for sentencing purposes, they equate possession of 50 or more marijuana plants to possession of an equivalent number of kilograms of marijuana.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 37-38) is unpublished, but the judgment is noted at 966 F.2d 1461 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1992. The petition for a writ of certiorari was filed on September 28, 1992, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Powers was sentenced to 63 months' imprisonment, to be followed by four years' supervised release. Petitioner Helton was sentenced to 92 months' imprisonment, to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. 37-38.

1. On June 12, 1990, employees of the Bon Secour National Wildlife Refuge in Alabama discovered a patch of 69 marijuana plants growing in a section of the refuge. The plants were well maintained. They were planted in potting soil, surrounded by mulch, and protected by rat poison; moreover, watering holes and irrigation ditches had been dug nearby. A trail from that marijuana patch led to other patches containing more than 200 additional marijuana plants, similarly well maintained. Agents of the United States Fish and Wildlife Service (FWS), which has jurisdiction over the refuge, undertook surveillance of the marijuana patches. Presentence Report 1-2; Sentencing Tr. 36, 38, 40, 42.

On June 16, 1990, the FWS agents saw petitioners drive up to one of the marijuana patches in a red pickup truck. Petitioners got out of the truck and walked over to one of the patches. Petitioner Helton told petitioner Powers that "the leaves were yellow and * * * [w]e need to pour the water and the fertilizer to [them]." Gov't C.A. Br. 5 (quoting 3 R. 193).

Petitioner Powers then started watering the marijuana plants. *Ibid.*

About two hours later, FWS agents arrested petitioners as they attempted to leave the area. Subsequently, petitioners were each indicted and convicted by a jury of violating 21 U.S.C. 841(a)(1). Gov't C.A. Br. 2, 5.

2. At sentencing, the district court found that each petitioner's offense of conviction involved the possession of 272 marijuana plants. Sentencing Tr. 42. Based on that finding, the court determined that the total offense level for each petitioner was 26. That determination was based on Section 2D1.1(c)(9) of the Sentencing Guidelines, which prescribes an offense level of 26 for offenses involving "[a]t least 100 KG [*i.e.*, kilograms] but less than 400 KG of Marihuana," and on Section 2D1.1(c) n.*, which provides that, "[i]n the case of an offense involving marihuana plants," the sentencing court should "treat each plant as equivalent to 1 KG of marihuana," "if the offense involved (A) 50 or more marihuana plants." Those provisions, in turn, implement 21 U.S.C. 841(b)(1)(B)(vii), which prescribes a five-year mandatory minimum term of imprisonment for convictions under 21 U.S.C. 841(a) that involve "100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight."

Petitioner Helton's criminal history placed him in category IV, with a sentencing range of 92-115 months' imprisonment. He received the minimum prison term of 92 months. Petitioner Powers' criminal history placed him in category I, with a

sentencing range of 63-78 months' imprisonment. He too received the minimum sentence of 63 months.

3. The court of appeals affirmed petitioners' convictions and sentences in an unpublished judgment order. Pet. App. 37-38.

ARGUMENT

Petitioners contend that 21 U.S.C. 841(b)(1)(B)(vii) and its implementing Guidelines provision violate the Due Process Clause because, for offenses involving 50 or more marijuana plants, they irrationally "equate[] one marijuana plant with one kilogram of marijuana." Pet. i. The equation is irrational, petitioners argue, because one marijuana plant yields much less than one kilogram of marijuana, Pet. 25-26, and because Congress did not use the same equivalency approach for other controlled substances harvested from plants, Pet. 15, 21-22. Those arguments lack merit.

"All six courts of appeals that have confronted the issue have rejected a constitutional challenge to the one plant/one kilogram equivalence" in 21 U.S.C. 841(b) and Sentencing Guidelines § 2D1.1(c). *United States* v. *Underwood*, 970 F.2d 1336, 1339 (4th Cir. 1992) (per curiam). Those courts have properly rejected the argument, renewed here, that the provisions are irrational because a marijuana plant does not yield one kilogram of consumable or marketable marijuana. As the Seventh Circuit recognized, "[t]here is no correlation to weight or yield because that was not the basis of Congress' sentencing scheme." *United States* v. *Webb*, 945 F.2d 967, 968 (1991), cert. denied, 112 S. Ct. 1228 (1992). Instead, the Seventh Circuit went on to explain, the provisions reflect Congress's belief that "the federal govern-

ment's most intense focus ought to be on major traffickers" in illegal drugs; accordingly, after "consulting with a number of DEA agents and prosecutors about the distributions patterns for these various drugs," Congress "selected quantities of drugs which if possessed by an individual would likely be indicative of operating at such a high level." *Ibid.* (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12 (1986)). The Ninth Circuit has similarly recognized:

> [Sentencing Guidelines] Section 2D1.1's treatment of marijuana plants does not purport accurately to translate the amount of marijuana harvestable from a given plant. Rather, the section's rationality lies in its recognition of a higher level of culpability for marijuana growers compared to those who merely possess the harvested product. Marijuana growers operate at the top of the distribution chain, and are thought an important target for purposes of deterrence.

United States v. *Belden*, 957 F.2d 671, 676, cert. denied, 113 S. Ct. 234 (1992).*

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* Accord *United States* v. *Haynes*, 969 F.2d 569, 571 (7th Cir. 1992) ("The equivalency provision is certainly not based upon a determination that one marijuana plant yields one kilogram of consumable product, for the actual yield is nowhere near that high. * * * Rather, it reflects Congress' judgment that an individual who grows 150 plants is just as culpable as one who has distributed 150 kilograms of marijuana."); *United States* v. *Lee*, 957 F.2d 778, 784 (10th Cir.) (Congress "found a defendant who is growing 100 newly planted marijuana plants to be just as culpable as one who has successfully grown 100 kilograms of marijuana"), cert. denied, 113 S. Ct. 475 (1992); *United States* v. *Osburn*, 955 F.2d 1500, 1507 (11th Cir.) ("[T]he equivalency scheme reflects Congress's

Likewise without merit is petitioners' argument that the equivalency provisions irrationally treat marijuana growers differently from growers of other drug-producing plants. One may readily conceive of plausible reasons why Congress applied the equivalency approach to marijuana growers without adopting a similar approach for growers of other illicit substances. See *Lee*, 957 F.2d at 783-784 (applying rational-basis standard in rejecting due process challenge to equivalency provisions); see also, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). For example, Congress could reasonably have determined that marijuana plants are more pervasive and easier to grow in this country than other drug-producing plants, such as poppies, peyote, or coca trees. Cf. 134 Cong. Rec. 24,915 (1988) ("Hawaii has a significant problem with marijuana cultivation.") (statement of Rep. Akaka); *Olsen* v. *DEA*, 878 F.2d 1458, 1467 (D.C. Cir. 1989) (appendix containing final order of DEA stating that "the actual abuse and availability of marijuana in the United States is many times more pervasive * * * than that of peyote"), cert. denied, 495 U.S. 906 (1990). Congress could also reasonably have determined that, in contrast to other drugs, marijuana is easier and cheaper to grow in this country than it is to import.

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beliefs concerning the seriousness of the crime [of growing marijuana], not the actual or potential weight of the plant."), certs. denied, 113 S. Ct. 223 and 113 S. Ct. 290 (1992). Although petitioners rely (Pet. 17) on the district court decisions in *Osburn* and *Lee*, those decisions were reversed in the courts of appeals.

Either of those determinations justifies Congress's focus on marijuana growers.

Finally, as petitioners observe (Pet. 7), the issues raised in this case are "identical" to those raised in the petition for a writ of certiorari to review *United States* v. *Osburn*, 955 F.2d 1500 (11th Cir. 1992). Indeed, petitioners "request that the[ir petition] for Certiorari * * * be joined with" the petition in *Osburn*. Pet. 7. This Court recently denied certiorari in *Osburn*, 113 S. Ct. 223 and 113 S. Ct. 290 (1992), and should likewise deny certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1992